

STATE OF MINNESOTA
IN COURT OF APPEALS

Clifford L. Whitaker, and Michael V. Mucci, on behalf of themselves and all others similarly situated,)	REPLY PETITION FOR
)	DISCRETIONARY REVIEW UNDER
)	MINN. R. CIV. APP. P. 105.01
Petitioners,)	
)	COURT OF APPEALS FILE NUMBER
vs.)	A05-2053
)	
3M Company,)	TRIAL COURT CASE NUMBER 62-C4-04-
)	012239 [T. Warner]
Respondent.)	
)	DATE OF FILING ORDER: 09/16/05

In their Petition for Discretionary Review, petitioners presented four reasons why the Court should grant review. Respondent 3M Company admits or does not contest three of them.

First, 3M admits that the two issues identified by petitioners have not been addressed by the Minnesota courts. (Respondent 3M Company's Opposition to Petition for Discretionary Review ("Opp.") at 5.)

Second, 3M impliedly acknowledges that the two issues have general application beyond this case. It argues that acceptance of petitioners' position "would provide attorneys with an overbroad power to frustrate the discovery rules by refusing to disclose any relevant information about a client" (*Id.* at 9.)

Third, 3M does not attempt to contest that the issues would evade appellate review if this Court does not accept review. Once the Anonymous Clients' identities are disclosed, their interests in confidentiality irrevocably will be lost. (Petition for Discretionary Review Under Minn. R. Civ. App. P. 105.1 ("Pet.") at 6.) *See McKenzie v. Northern States Power Co.*, 440 N.W.2d 183, 185 (Minn. Ct. App. 1989) (discretionary review is inappropriate when "the interlocutory order may be reviewed on appeal from a final determination of the entire action")

(citing *Clark v. Monnens*, 436 N.W.2d 830 (Minn. Ct. App. 1989)). The Court should accept review based on one or more of these three undisputed bases for review, regardless how it views the final factor.

As to that final factor, 3M disputes that the issues raise important questions that are complex and difficult. According to 3M, petitioners' position is "dubious" and based on "a fundamental misunderstanding of the interaction between the ethics rules and the superior laws and rules governing discovery." (Opp. at 5.)

Despite its dismissive rhetoric, 3M is silent as to one of the two issues identified by petitioners, "[w]hether the identity of a client or former client is 'information relating to the representation of a client' that an attorney 'shall not knowingly reveal' within the meaning of Minn. R. Prof. Conduct 1.6." (Pet. at 5.) Apparently, 3M does not contest that client identity falls within the scope of Rule 1.6.

Thus, 3M's Opposition boils down to its merits argument that the district court was correct on the second issue, "[w]hether, in light of Minn. R. Prof. Conduct 1.6 and Minn. R. Civ. Pro. 23.04, a person's identity and the fact that [he] sought legal advice regarding possible involvement in a class action is discoverable information, pursuant to Minn. R. Civ. P. 26.02, where the person requests anonymity and, after seeking that advice, decides not actively to participate in the action." (*Id.*) 3M's own arguments on this point, however, unintentionally betray that the issue is important, complex and difficult, and that petitioners have provided good reasons to believe that the district court got the answer wrong.

3M makes two mutually inconsistent arguments that the district court's ruling should be affirmed. First, it argues that laws and rules governing discovery are "superior" to ethical rules, including Rule 1.6. (Opp. at 5, 6, 8.) Second, it argues that the district court did not abuse its

discretion in denying petitioners' motion for a protective order. (*Id.* at 4-5.) These positions are inconsistent because, if discovery laws and rules are superior to ethical rules, the judge's decision was not an exercise of discretion, but mandated by law. 3M's inconsistent advocacy reflects the need for appellate-level guidance on the issues raised by the Petition.

3M is wrong in contending that discovery rules necessarily trump Rule 1.6 and the principle of lawyer-client confidentiality that the Rule effectuates. All that 3M cites in support (Opp. at 9) of that proposition is Comment 3 to Rule 1.6,¹ which provides in part:

The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. *The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.*

Minn. R. Prof. Conduct 1.6, Comment 3 (emphasis added). In the absence of other evidence, the last sentence plausibly could have two meanings. First, it could mean, as 3M would like the Court to believe, that Rule 1.6 applies *only* in situations other than judicial or other evidentiary proceedings. Alternatively, it could mean that Rule 1.6 applies *also* in situations other than judicial or other evidentiary proceedings. Reading beyond Comment 3, however, makes clear that the commentators intended the second meaning, *i.e.*, that Rule 1.6 applied both in judicial proceedings and in non-evidentiary situations. The language of the Rule itself creates no carve-out for litigation or discovery. Comment 10 contradicts any automatic assumption that discovery rules trump Rule 1.6 by expressly stating that the question whether other law "supersedes Rule 1.6 is a question of law beyond the scope of these rules." And Comment 11 directs a lawyer, unless a client consents, to make all non-frivolous arguments against a judicial order compelling

¹ 3M also cites *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995) and Minn. R. Civ. P. 26.02(a). (Opp. at 8.) The former is inapplicable because it applies to claims of attorney-client privilege, *id.* at 877, and the latter is inapplicable because, while the Rule states that it is subordinate to information protected by privilege, it is silent as to other confidential information.

disclosure of information relating to representation of that client. If Rule 1.6 did not apply in the judicial setting, Comment 11 would be unnecessary. Accordingly, judges, lawyers and the public are left with no express guidance from the rules as to whether and under what circumstances discovery rules supersede Rule 1.6. This demonstrates why the petition should be granted.

Rule 1.6 and Minn. R. Civ. P. 26.02 are most likely to collide in the context of Rule 23 class actions or other potential multi-plaintiff litigation.² The public and our system of justice have a strong interest in persons freely seeking legal advice. Judicial impediments to that right present a compelling interest that warrants review, particularly given the use of Rule 23 class actions as a mechanism efficiently to resolve disputes and to protect the public interest. The policies set out in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), a decision that 3M studiously avoids, tip the balance decisively in favor of preserving the anonymity of putative class members who contact class counsel, decide not to participate actively, and indicate that their identity should be protected.³ In order to “further[] ... the policies embodied in ... Rule 23,” the federal analog to Minn. R. Civ. P. 23, the United States Supreme Court stressed the importance of the ability of putative class members to inform themselves of their rights and protecting plaintiffs’

² The Court could decide this Petition on the relative weight of Rule 1.6 and Minn. R. Civ. P. 26.02 only in the context of a class action, although the issues presented include the conflict of rules that could arise in any multi-plaintiff representation.

³ 3M repeatedly conjures up apparitions that the three Anonymous Clients possess critical information that petitioners’ counsel do not want to divulge. (Opp. at 3.) Plaintiffs gave a single response to two interrogatories, one of which sought the identity of any person with whom a petitioner or his counsel had *communicated* regarding any of the allegations in the Complaint. This sweeping interrogatory, which 3M characterizes as “standard,” does not require that the person have any knowledge. These Anonymous Clients are not actively participating in the litigation or communicating with counsel, and they will not give evidence. Their prior conversations with counsel are privileged and not subject to disclosure. Thus, revealing their identity would do no more than identify them to 3M as persons who sought legal advice. This fact should not be used to distinguish them from thousands of other current and former employees for purposes of discovery.


ability “to inform potential class members of the existence of this lawsuit.” *Id.* at 101. Requiring counsel to reveal the names of putative class members who seek legal advice but decide not to participate interferes directly with the interests *Gulf Oil* was so careful to protect. The district court failed to recognize these interests and provided no rationale for the chilling effect of its decision.

3M’s argument that the district court did not abuse its discretion misses the mark. First, under the circumstances here, the interests underlying Rule 1.6 and Minn. R. Civ. P. 23 were not considered and should outweigh the interests underlying discovery as a matter of law.⁴ Second, if a balancing of the interests under the applicable rules was appropriate, the district court did not interpret the meaning of Minn. R. Civ. P. 26.02 or its ability to tailor discovery under Minn. R. Civ. P. 26.04 to account for those interests. The district court, without guidance from Minnesota authority, simply assumed that 3M was “entitle[d] to discover the identities” of these non-litigant clients. “A district court abuses its discretion when its ruling is based on an erroneous view of the law.” *State v. Storkamp*, 656 N.W.2d 539, 541 (Minn. 2003).

The issues presented in this Petition thus are important, complex and difficult. The Court should accept the Petition for that reason as well as all of the other reasons that 3M concedes.

DATED: October 26, 2005

SPRENGER & LANG, PLLC

By: 
Susan M. Coler (MN Bar No. 217621)
Mara R. Thompson (MN Bar No. 196125)

⁴ 3M tries to bolster that interest by claiming that, without knowing the identity of the Anonymous Clients, it is at risk “of engaging in what later could be claimed to be improper *ex parte* contacts with represented parties” (Opp. at 3.) However, the district court has entered an order governing communications with putative class members that, if followed, would protect 3M fully. Moreover, Rule 4.2 bars a lawyer from communicating only “with a person the lawyer *knows* to be represented by another lawyer in the matter” (emphasis added). Thus, there is no risk of violation of Rule 4.2.

310 Fourth Avenue, So.
Minneapolis, MN 55415
(612) 871-8910
(612) 871-9270 [facsimile]

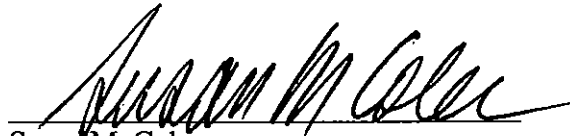
Michael D. Lieder (DC Bar No. 444273)
Thomas J. Henderson (DC Bar No. 476854)
Mark Amadeo (DC Bar No. 479355)
Eden Brown Gaines (GA Bar No. 282098)
1400 Eye Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 265-8010
(202) 332-6652 [facsimile]

AARP FOUNDATION LITIGATION
Thomas W. Osborne (DC Bar No. 428164)
Daniel B. Kohrman (DC Bar No. 394064)
Laurie A. McCann (DC Bar No. 461509)
601 E Street, N.W.
Washington, D. C. 20049
(202) 434-2060
(202) 434-6424 [facsimile]

Attorneys for Petitioners

AFFIDAVIT OF SERVICE

I hereby certify that I caused to be served on, October 26, 2005 a copy of the Reply Petition for Discretionary Review Under Minn. R. Civ. App. P. 105.01, on Holly S.A. Eng, Esq., Dorsey & Whitney, LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402-1498, attorneys for Respondent, by placing copies in an envelope, addressed to said attorneys at their last-known address above, and causing it to be delivered by hand to them at their address.


Susan M. Coler

Subscribed and sworn to before me

this 26th day of October 2005.


Notary

